No. 87-741

Supreme Court, U.S.
FILED
OCT 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1987

JOSEPH WILLIAM "BILLY" DOWNS - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

WILLIAM EDWARD HARTLAGE
FULTON HUBBARD & HUBBARD
117 East Stephen Foster Avenue
Bardstown, Kentucky 40004-0088
(502) 348-6457
Counsel for Appellant

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

3 pp

QUESTIONS PRESENTED

I. Did the decision of the Co-Defendants, Freddy and Danny Thompson, to invoke the protection of the Fifth Amendment, upon advice of counsel, after pleading guilty, constitute either a waiver of the right of the Petitioner to cross-examine them or constitute procurement of co-defendants' silence enabling their Grand Jury testimony and other out of Court testimony to be used as substantive evidence against the Petitioner. Petitioner was represented at trial by the same attorney as the Thompsons.

II. Did the jury selection process using only registered voters preclude an identifiable section of the population thus denying the defendant due process.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iii
Opinion Below	1
Jurisdictional Statement	1– 2
Constitutional Provisions Involved	2
Statement of the Case	2– 4
Statement of Facts	4– 6
Reason for Granting the Writ	6–15
I. The Kentucky Supreme Court's Reasoning That Employment by Co-Defendants of the Same Attorney Constitutes a Waiver of the Right to Cross-Examine His Co-Defendant, Raises an Issue of Importance to the Administration of Criminal Justice.	6–12
II. The Selection of Jury Members Exclusively from Jury Lists Denied the Defendant Due Process Under the Sixth Amendment Since the Method of Selection Precludes an Identifiable Section of the Population, Non-Voters	12–15
Conclusion	15
Certificate of Service	16
Notice of Appearance	17
Appendix	1a–14a

TABLE OF AUTHORITIES

Cases:

	PAGE
Jett v. *Commonwealth*, Ky., 436 S. W. 2d 788 (1969)	7, 10, 11
Nugent v. *Commonwealth*, Ky., 639 S. W. 2d 761 (1982)	7, 10, 11
Smith v. *Commonwealth*, Ky., 634 S. W. 2d 411 (1982)	7, 10, 11
United States v. *Mayes*, 512 F. 2d 637 (1975)	8, 11
Rakas v. *Illinois*, 439 U. S. 128, 99 S. Ct. 421 (1978)	8
Douglas v. *Alabama*, 380 U. S. 415, 85 S. Ct. 1074 (1965)	9
Commonwealth v. *Brown*, Ky., 619 S. W. 2d 699 (1981)	9
Phillips v. *Commonwealth*, Ky., App., 600 S. W. 2d 485 (1980)	10
Lee v. *Illinois*, 54 L. W. 455, ___ U. S. ___; 106 S. Ct. 2056 (1986)	11
Glasser v. *United States*, 315 U. S. 60, 62 S. Ct. 457 (1942)	12
Tinsley v. Commonwealth, Ky., 495 S. W. 2d 776 (1973)	12
Smith v. *Texas*, 311 U. S. 128, 61 S. Ct. 164 (1940)	13
Brown v. *Allen*, 344 U. S. 443, 73 S. Ct. 397 (1953)	13
Fay v. *N. Y.*, 332 U. S. 261, 67 S. Ct. 1631 (1946)	13
Strauder v. *West Virginia*, 100 U. S. 303	14

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

No.

JOSEPH WILLIAM "BILLY" DOWNS - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, Joseph William "Billy" Downs prays that a Writ of Certiorari issue to review the decision of the Supreme Court for the Commonwealth of Kentucky rendered in this action on June 11, 1987.

OPINION BELOW

The Opinion of the Supreme Court of Kentucky was rendered on June 11, 1987. That Court affirmed the Judgment of the Trial Court. Petition for Rehearing was denied by the Kentucky Supreme Court on September 4, 1987. A copy of the decision, which is unreported, is contained in the Appendix to this petition.

JURISDICTION

The Order of the Supreme Court of Kentucky denying Petitioner's motion for a rehearing was entered on September 4, 1987. This petition for a Writ of Certiorari was filed within 60 days of that date. The jurisdiction of this Court has been invoked pursuant to 28 USC § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The decision below brings into question the rights of the defendant under the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The Petitioner/Appellant below was indicted, along with two brothers, Danny and Freddy Thompson, on multiple counts of obscuring the identity of a motor vehicle, trafficking in stolen auto parts, knowingly receiving stolen property worth over $100 and of being a persistent felony offender. No waiver of dual representation as required by Kentucky Rules of Criminal Procedure 8.30 was obtained.

All three defendants employed the same attorney and the Thompsons agreed to testify before the Grand Jury in exchange for probation (T.E. 122), but refused to testify at trial upon advice of counsel. (T.E. 142). This same counsel also represented the Petitioner at trial.

After a hearing, the Trial Court reasoned that the Thompsons had waived their Fifth Amendment rights

and ordered them to testify. (T.E. 133). They refused, fearing other state and federal charges. Over the objection of counsel, the Thompson's Grand Jury testimony and statements given to police implicating the Petitioner, were read and used as substantive evidence against Downs. (T.E. 135, 157-174 and T.E. 259-272). Downs did not take the stand in his own behalf.

The case was submitted to the jury who deliberated without result for some five (5) hours; at some point in time a juror approached and informed the Court he was not satisfied with the evidence. (T.E. 535). An "Allen Charge" was given urging the jury to continue. After another hour, the foreman asked if a Voir Dire question on the ability to imprison could be read. (T.E. 536). Defense counsel objected and moved for a mistrial. (T.E. 537), however, a portion of the Voir Dire was read to the jury. (T.E. 540).

One half hour later the jury returned with a verdict of guilty on the felony charges and the next day found the Petitioner to be a persistent felon.

On March 5, 1986, the Hon. Larry D. Raikes, Judge of the Nelson County Circuit Court sentenced the Petitioner to 20 years in prison, under KRS 532.-080. A Notice of Appeal to the Supreme Court was filed on March 5, 1986 and may be found at *page 214* of the *Record on Appeal* below.

In an opinion rendered on June 11, 1987, the Supreme Court affirmed the decision of Nelson Circuit Court, reasoning that the inability to examine the

Thompsons and their decision to invoke the Fifth Amendment was attributable to the Petitioner because all the Co-Defendants were represented by the same counsel. The Court also found no error in allowing the Voir Dire questions to be read to the jury because the purpose behind such was to induce a break in the deadlock. The other arguments concerning the composition of the jury pool and the methods of selection or excusing jurors were dismissed offhand.

A Motion for a rehearing was denied on September 4, 1987. This Petition for a Writ of Certiorari followed.

STATEMENT OF FACTS

Following a telephone tip, local law enforcement agencies conducted a raid upon the farm of Danny Thompson in Nelson County, Kentucky. The officers found at various places, parts of automobiles and trucks which had been stolen. (T.E. 242-297). Danny Thompson and his brother, Freddie Thompson were indicted along with the Defendant, Joseph William "Billy" Downs, on charges involving trafficking in stolen auto parts, theft, and obscuring the identity of a motor vehicle. The Defendant, Downs, was also charged with being a persistent felony offender.

The Defendants, Danny and Freddie Thompson agreed to testify *before the Grand Jury* in exchange for probation. (Emphasis ours) (T.E. 122). Their out of court statements and testimony before the Grand Jury implicated the Defendant. (T.E. 157-173 and 222-239).

At Downs' trial the Thompsons invoked their Fifth Amendment privilege against self-incrimination. (T.E. 142). The Court ruled that the privilege had been waived and allowed their testimony to be read as substantive evidence against Mr. Downs, over the objections of defense counsel who moved for a mistrial. (T.E. 133). The Petitioner also objected to the jury's selection from voters lists thus excluding a substantial portion of the population, non voters. (T.E. XX).

Trial counsel for Downs had represented the Thompsons, and had informed the Court that the Thompsons would, under his advice, decline to testify. (T.E. 119). The Commonwealth next called two persons not yet indicted who allegedly were found in possession of stolen parts. (T.E. 180, 357). Having been insulated by favorable treatment including non prosecution, they too implicated the defendant, Downs.

After closing arguments the jury deliberated for some time. During deliberations the jury announced it was deadlocked. (T.E. 535). An "Allen Charge" was given. (T.E. 535). The deadlock continued until a jury member asked that questions from the Voir Dire be read from the Court's transcript. (T.E. 537). Those questions concerned one's scruples in sending a person to prison. Following the rereading of the question, over objections of defense counsel (T.E. 537) the jury returned with a verdict of guilty. Because the Defendant's sentence was enhanced to twenty years as a persistent felony offender, an appeal to the Kentucky Supreme Court was pursued by right. That Court

affirmed the Nelson Circuit Court. (Opinion of the Kentucky Supreme Court, appendix). A petition for rehearing was denied on September 4, 1987. (Appendix).

REASON FOR GRANTING THE WRIT OF CERTIORARI

I. The Kentucky Supreme Court's Reasoning That Employment by Co-Defendants of the Same Attorney Constitutes a Waiver of the Right to Cross-Examine His Co-Defendant Raises an Issue of Importance to the Administration of Criminal Justice.

Following a raid upon the Thompson farm wherein evidence of an automobile theft ring was uncovered; the Thompsons, Danny and Freddie, implicated the Defendant. (Statements of Danny Thompson T.E. pp. 157-174) and Freddie Thompson T.E. pp. 222-238) After their arrest the Thompsons hired Joseph William "Billy" Downs' attorney to represent them as well. The Thompsons struck a deal to testify at the Grand Jury hearing, in return for probation but refused to testify at trial. The Defendant, Downs, was thus unable to cross-examine them.

Following opening statements in which the Commonwealth attorney let it be known that the Thompsons had pled guilty and would testify against Downs, the Thompsons, on advice of counsel, invoked the Fifth Amendment. When they persisted the Commonwealth sought to introduce their testimony before the Grand Jury. Counsel for the Defendant, Downs, objected since he would be unable to cross-examine. (T.E. 126-127) The Trial Court ruled that the Thompson's testi-

mony could be introduced as substantive evidence citing three (3) cases, *Jett* v. *Commonwealth,* Ky., 436 S. W. 2d 788 (1969); *Nugent* v. *Commonwealth,* 639 S. W. 2d 761 (1982); *Smith* v. *Commonwealth,* Ky., 634 S. W. 2d 411 (1982). The trial court felt that the Thompsons had waived their Fifth Amendment rights by testifying before the Grand Jury, they were in court and "available", thus satisfying the Sixth Amendment confrontation problem raised by Downs. (T.E. 133). The statements before the Grand Jury, *as well as statements given police previously,* were read to the jury. (T.E. 222 and 259). No opportunity to cross-examine either witness was afforded because each persisted in invoking the Fifth Amendment privilege and were jailed for contempt. (T.E. 149).

The Commonwealth produced several witnesses who claimed to have participated in the receipt of stolen property, yet remained unindicted. These co-conspirators were, in addition to the Thompsons, the only evidence of Downs' supposed participation.

At the end of the case the jury retired to deliberate. In an effort to break a deadlock, voir dire questions were read back to jury members. The deadlock was thus broken and Downs was convicted on all but one charge. (T.E. 540-542). The defendant was sentenced as a persistent felony offender to a term of twenty (20) years in prison. (T.E. LIII).

The Kentucky Supreme Court ruled that the Thompsons had waived their right to invoke the Fifth Amendment and that since Mr. Downs had allegedly

procured their silence he could not complain of his inability to examine, citing *United States* v. *Mayes,* 512 F. 2d 637 (1975).

It has long been the position of this Honorable Court that a defendant may not assert the rights of another person to protect himself from incrimination. *Rakas* v. *Illinois,* 439 U. S. 128, 99 S. Ct. 421 (1978). This is based upon the idea that the defendant lacks standing to raise the issue. It is logical to assume the corollary that third persons may not waive another's rights since those rights are personal to that individual.

At the trial level, the Judge ruled that the Thompsons gave up their Fifth Amendment rights and were *technically* able to be cross-examined by Mr. Downs' attorney. (T.E. 128). This was in spite of the fact that defense counsel had represented the Thompsons and had advised them against testifying. Counsel was placed in a position that in order to protect Mr. Downs he had to cross-examine his other clients, the Thompsons, possibly exposing them to further charges. The Trial Court never raised the question of whether Mr. Downs gave up his right of confrontation; never inquired about a potential conflict of interest between the multiple defendants. The Trial Court was only concerned with whether the Thompsons were still able to invoke their Fifth Amendment privilege. (T.E. 129). The Commonwealth Attorney was the person who raised the issue of waiver of cross-examination by dual representation. (T.E. 131). The Court declined to appoint independent counsel for the Thompsons

(T.E. 139) and refused counsel's motion for a mistrial when it became apparent that counsel could not cross-examine these key witnesses. (T.E. 135).

The central question before this Court is whether Mr. Downs waived his right to cross-examine and confront his accusers by seeking representation from the same attorney as they at trial.

The Thompsons along with others, including Joseph William "Billy" Downs were charged in trafficking in stolen parts among other charges. This became, at least in the instructions, a conspiracy type trial in which trial strategy plays an important part.

The Thompsons secured probation in exchange for testifying before the Grand Jury. These statements, not being subject to cross-examination would normally be inadmissible against a defendant at trial because of protections afforded by the Sixth Amendment to the United States Constitution. *Douglas* v. *Alabama,* 380 U. S. 415, 85 S. Ct. 1074 (1965); *Commonwealth* v. *Brown,* Ky. 619 S. W. 2d 699 (1981).

At trial, it became apparent that the admissibility of the Grand Jury testimony placed counsel in a position of conflict. (T.E. 139). There was never a waiver of dual representation executed nor of record as is mandated by Kentucky Rules of Criminal Procedure 8.30 (Rcr 8.30). The Federal Courts have recognized a rule similar to Rcr 8.30, *see Holloway* v. *Arkansas,* 435 U. S. 475, 98 S. Ct. 1173 (1978), requiring automatic reversal in such cases of conflict. Neither the Thompsons nor Mr. Downs executed any such waiver.

(T.E. XXXII). The fact that Mr. Downs allegedly suggested his attorney to represent the Thompsons does not indicate any waiver of the right to cross-examine on his part. The Thompsons had expressed dissatisfaction with the attorney suggested by police and prosecutors. (T.E. L.).

The Trial Court committed error in relying upon three Kentucky cases and their progeny in allowing the Thompsons testimony to be used as substantive evidence. (T.E. 127). The Court relied upon *Jett* v. *Commonwealth,* Ky. 436 S. W. 2d 788 (1969); *Nugent* v. *Commonwealth,* Ky. 639 S. W. 2d 761 (1982) and *Smith* v. *Commonwealth,* Ky. 634 S. W. 2d 411 (1982). Unlike the cases cited by the Trial Court, here the witnesses refused to answer *any* questions. Like the scenario in *Phillips* v. *Commonwealth,* Ky. App. 600 S. W. 2d 485 (1980), reversible error was committed by reading the out of Court testimony of the Thompsons to the jury and allowing it to be used as substantive evidence, when the Co-Defendant answered no questions in Court.

The Trial Court relied upon the residual hearsay rule finding that there was adequate indicia of reliability since the Thompsons had testified under oath before the Grand Jury and their refusal to testify was similar to a witness being unable to remember. The trial court ruled that in such a situation their out of court statements could be introduced. Normally this would be used against the silent witness.

The three cases cited by the Trial Court do not apply in this situation. The Nugent case (*Nugent* v. *Commonwealth,* Ky. 639 S. W. 2d 761 (1982)) laid out certain criteria in order for out of Court statements by witnesses to be used. One criteria is that the witness must be subject to cross-examination, which the Thompsons were not. The Smith case (*Smith* v. *Commonwealth,* Ky., 634 S. W. 2d 411 (1982) speaks of indicia of reliability of the witnesses statement. This flies in the face of this Court's holding in *Lee* v. *Illinois,* 54 LW 455, — U. S. —; 106 S. Ct. 2056 1986 which held that Co-defendants statements used as substantive evidence violates the confrontation clause of the Sixth Amendment because Co-Defendants statement are presumably unreliable.

The Kentucky Supreme Court in affirming, cited to *U. S.* v. *Mayes,* 512 F. 2d 637 (1975), holding that since the Thompsons silence was procured by Downs he could not complain. The only evidence the Court could have considered in so ruling was the in-chambers discussion regarding the Thompsons attempt to invoke the Fifth Amendment. (T.E. 118-141). The statement by defense counsel . . . "we were employed by these people on the representation they were not going to testify against Billy Downs" . . . indicates that any deal with the Thompsons involved at best them and their attorney. Once they testified against Downs, the interest of Downs and the Thompsons became at odds and without any evidence that Downs waived his right to cross-examine or indeed waived dual repre-

sentation, the situation requires reversal when the conflict between the parties arose. As the court said in *Glasser* v. *United States,* 315 U. S. 60, 62 S. Ct. 457 (1942). "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." The issue was preserved by the motion for mistrial, the motion of the Commonwealth for separate counsel (T.E. 135) (T.E. 9) and against the Rcr 8:30 requirement for an executed waiver brought to the Court's attention in chambers (T.E. 125).

II. The Selection of Jury Members Exclusively From Jury Lists Denied the Defendant Due Process Under the Sixth Amendment Since the Method of Selection Precludes an Identifiable Section of the Population, Non-Voters.

Defendant moved the trial court, prior to trial, to discharge the jury due to the fact that an identifiable segment of the population, that being all non-voters, was statutorily excluded from the jury panel. The trial court overruled the motion (T-57-T-58).

In *Tinsley* v. *Commonwealth,* Ky., 495 S. W. 2d 776 (1973), the Court of Appeals states that, "[P]urposeful discrimination may not be assumed or asserted, it must be proved." In this instance, Defandant is not attacking the method in which this trial court determines the make-up of a jury under KRS 29A.040.[1] Rather, Defendant asserts that the statute itself is unconstitutional in that it sets out to exclude a clearly

[1]KRS 29A.040 prior to its amendment in 1982 included property tax lists as well as votor lists to comprise the master jury lists.

definable segment of the population, non-voters, from any jury service in the Commonwealth of Kentucky. Thus, when the statute is followed, discrimination *inevitably* follows.

Section Seven of the Constitution of Kentucky guarantees each of its citizens the right to a trial by jury. The Constitution of the United States gives the same guarantee in its Sixth Amendment. The United States Supreme Court, in considering the issue of jury make up stated in *Smith* v. *Texas,* 311 U. S. 128 that a jury should be ". . . a body truly representative of the community." In *Brown* v. *Allen,* 344 U. S. 433 (at 474) the same Court went even further by stating, "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, *so long as the source reasonably reflects a cross-section of the population* suitable in character and intelligence for that civic duty". (emphasis by the Court).

Defendant believes that a fair cross-section of the community cannot and never will be represented by voters alone. Speculation on the harms that could occur under this system come readily to mind, but the United States Supreme Court has ruled in *Fay* v. *New York,* 332 U. S. 261 (at 300) that a showing of any deleterious effect is not necessary, stating, "If the constitutional right to a jury impartially drawn from a cross-section of the community has been violated, we should indicate that right even though the effect of the violation has not yet put in a tangible appearance.

Otherwise that right may be lost in a welter of evidentiary rules."

The voters of Nelson County comprise at best half of those persons county-wide who are otherwise eligible to vote. In some areas of the Country this would exclude whole minorities. Registration runs heavily toward one political party. What of those who are not registered for whatever reason? Unregistered voters' exclusion from the possibility of being called as jurors constitutes the exclusion of a readily identifiable segment of the population.

In dealing with the issue of jury make-up the U. S. Supreme Court in *Strauder* v. *West Virgina,* 100 U. S. 303 said:

> The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his commentaries says the right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter. "It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called packing juries." It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny persons of those classes the full enjoyment of that protection which others enjoy.

Unlike *Strauder, supra,* this is not a case where proof of exclusion is necessary. The exclusion is statutory much in the same way as was the case when white males were the only persons eligible for jury service. That abuse has been corrected. This one should now be corrected. Because Defendant was denied his constitutional right to a jury composed of his peers, drawn from a fair cross-section of the population, this case should be reversed.

CONCLUSION

The Thompsons decided to employ Mr. Downs' attorney to procure the favorable plea agreement that had been promised to them. There is no evidence that Mr. Downs agreed to waive his right to examine the witnesses. When the statements of the Thompsons were read and the Thompsons insisted upon taking the Fifth Amendment, Mr. Downs was unable to cross-examine the witnesses and the Court refused to allow the conflict between the Co-Defendants to be resolved. Lacking the required waivers under Rcr 8.30 and *Holloway* v. *Arkansas, supra,* the case should be remanded for a new trial. Additionally the Defendant was denied due process by the composition of the jury pursuant to KRS 29A.050 which excludes non voters.

Certiorari should be granted.

Respectfully submitted,

WILLIAM EDWARD HARTLAGE
FULTON, HUBBARD & HUBBARD
117 East Stephen Foster Avenue
Bardstown, Kentucky 40004-0088
(502) 348-6457
Counsel for Petitioner

CERTIFICATE

This is to certify that the foregoing was served by mailing a true copy thereof to Hon. David L. Armstrong, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this ____ day of October, 1987.

_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. _____

JOSEPH WILLIAM "BILLY" DOWNS - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

NOTICE OF APPEARANCE

The Clerk will enter my appearance as counsel for petitioner. I certify that I am a member of the bar of the United States Supreme Court. The Clerk is requested to notify the undersigned of action by the Court by regular mail.

Respectfully submitted,

WILLIAM EDWARD HARTLAGE
FULTON HUBBARD & HUBBARD
117 East Stephen Foster Avenue
Bardstown, Kentucky 40004-0088
(502) 348-6457

Counsel for Petitioner

APPENDIX

APPENDIX

RENDERED: June 11, 1987
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

86-SC-401-MR

JOSEPH WILLIAM "BILLY" DOWNS - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Nelson Circuit Court
Hon. Larry D. Raikes, Judge
Criminal Action No. 85-CR-011-1-014-1

MEMORANDUM OPINION OF THE COURT AFFIRMING

This appeal is from a judgment based on a jury verdict which convicted Downs of three counts of knowingly receiving stolen property, one count of obscuring the identity of a machine and one count of trafficking in stolen vehicle parts. He was also found guilty of being a first-degree persistent felony offender and an enhanced sentence of twenty years was imposed.

The issues are whether the trial judge properly allowed the introduction of out-of-court statements of certain witnesses after they refused to testify; whether there was error in calling the same witnesses to testify; whether it was error to allow the clerk to excuse jurors; whether the opening statement was proper by the prosecution; whether it was error to allow the jury to separate between the conclusion of the principal case and the beginning of the PFO

phase; whether it was error to give an "Allen" charge; whether there was error in the instructions; whether the verdicts were supported by sufficient evidence; whether KRS 29A.040 is constitutional and whether there was error in refusing to instruct the jury on parole eligibility.

This case involves four consolidation indictments and followed a raid by local police on a farm owned by Danny and Freddy Thompson, who were co-defendants. A search of the farm revealed the existence of a car-stripping operation commonly known as a "chop shop." The Thompson brothers testified extensively before the Grand Jury but they refused to testify at trial on Fifth Amendment grounds. The trial judge permitted the introduction of the earlier statements from the two brothers. Upon conviction, this appeal was initiated.

This Court affirms the judgment.

The trial judge did not commit reversible error in allowing the prosecution to introduce out-of-court statements of the Thompson brothers after they refused to testify. Downs' attorney agreed to represent the Thompsons on their promise that they would not testify against Downs at trial. It was Downs' counsel who recommended that they claim the Fifth Amendment and it was he who reminded Freddy Thompson of his promise before he was called to the stand.

The trial court held that invocation of the Fifth Amendment was improper because the witnesses had previously pleaded guilty and had been sentenced. The Court reasoned correctly that a valid plea of guilty acts as a waiver of the privilege against compulsory self-incrimination. *Boykin* v. *Alabama,* 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 274 (1969).

There was no reversible error in allowing the Thompsons to testify before the jury. After a lengthy hearing the trial judge ruled that they were not entitled to claim

the Fifth Amendment and determined that the prosecution could ask them the questions it sought to have answered in front of the jury. *See Smith* v. *Commonwealth,* Ky. 634 S. W. 2d 411 (1982); *Jett* v. *Commonwealth,* Ky. 436 S. W. 2d 788 (1969). When the Thompsons refused to comply with the direction of the Court, the Commonwealth was permitted to present their previous statements.

The prosecution did not use the occasion of the presence of the Thompsons on the stand to convey to the jury information they would not otherwise receive. The questions that involved the Fifth Amendment claims did not mention Downs, the nature of the offense, or the acts committed by him. There was no prejudice to the defendant. *See Namet* v. *United States,* 373 U. S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963).

The court and the prosecution had the right to test the resolve of the witnesses by subjecting them to examination in the formal atmosphere of open court. The fact that Downs had procured their silence forecloses his right to complain regardless of any possible impact on the jury. *See United States* v. *Mayes,* 512 F. 2d 637 (1975). Our examination of the record indicates that the witnesses were ordered to jail but that such order was not given in the presence of the jury.

The trial judge did not improperly allow the circuit clerk to excuse jurors. The juror qualification forms filed with the exhibits in this record indicates that all but one of the excuses bear the trial judge's signature or initials and appear to be in his handwriting. There is no evidence of probative value that any of the jurors were excused by the clerk.

The reference by the prosecution in opening statement to the guilty pleas of the brothers did not amount to reversible error because the defendant had injected the issue into the case during voir dire examination.

Downs in his voir dire examination noted that the Thompson brothers had made a deal with the prosecution that they would not have to go to jail in return for their testifying against the defendant. In these circumstances, there was nothing improper in the explanation by the prosecution in opening statement as to what composed the deal. It was Downs that brought the details of the Thompson plea bargain to the attention of the jury in his cross-examination of the Commonwealth Attorney.

There was no reversible error in allowing the jury to separate between the conclusion of the principal trial and the beginning of the PFO trial. The jury returned their verdict on the primary charges at 10:26 p.m. and the trial judge excused them until 10 a.m. the following morning when the PFO phase began. This procedure is not a violation of Rcr 9.66. There is no authority to support the arguments of the defendant.

It was not reversible error to give the jurors the "Allen" charge or to respond to a question by a juror concerning voir dire. The fact that the trial judge said that "these cases are expensive," does not warrant reversal *Earl* v. *Commonwealth,* Ky. App. 569 S. W. 2d 686 (1978) is dispositive of the question of the mention of an expensive trial. It is not necessary for the trial judge to read the words contained in *Allen* v. *United States,* 164 U. S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896) verbatim. The exact wording of the instruction is within the discretion of the trial judge. *Burnham* v. *Commonwealth,* 283 Ky. 361, 141 S. W. 2d 282 (1940). The instruction is improper only if it has a coercive effect. *Abbott* v. *Commonwealth,* Ky. 352 S. W. 2d 552 (1961).

There was no singling out of the minority jurors as denounced by *Allen, supra.* The admonition was given to all the jurors and the trial judge was unaware of the

posture of the majority and minority and there was no indication of any coercion.

It was not reversible error for the trial judge to refresh the memory of the jury regarding questions on voir dire. The trial judge had the court reporter read back a portion of the voir dire examination concerning the ability of the jurors to follow the law. Such a review had no bearing on the ultimate verdict of guilt. There is no indication that the jurors were coerced in any way by this artion. *Abbott, supra.*

It was not reversible error for the trial court to add the names of accomplices who were not charged in indictments No. 2, 3, 4 and 6. Downs was convicted in trafficking under Instruction No. 7, which was not objected to.

There is no reason to extend the rule of *Brown* v. *Commonwealth,* Ky. 498 S. W. 2d 119 (1973). Downs was not prejudiced in any way and the variance in accomplices named could not have affected either the conduct of the defense or the verdict of the jury.

It was not reversible error for the trial judge to overrule the motion of the defense for a directed verdict. There was sufficient evidence to submit the case to the jury. *Trowel* v. *Commonwealth,* Ky. 550 S. W. 2d 530 (1977); *Commonwealth* v. *Sawhill,* Ky. 660 S. W. 2d 3 (1983).

The argument by Downs that KRS 29A.040, which provides that a list of registered voters shall be used or included in the jury pool is unconstitutional is without merit. *Ford* v. *Commonwealth,* Ky., 665 S. W. 2d 304 (1984).

There was no error committed by the trial judge in refusing to instruct the jury on parole eligibility. *Farmer* v. *Commonwealth,* Ky. 450 S. W. 2d 494 (1970) is dispositive. We are totally unconvinced by the arguments presented by Downs.

The judgment is affirmed.

Stephens, CJ., Lambert, Leibson and Wintersheimer, JJ. concur. Gant, J., concurs in result. Vance, J., dissents. Stephenson, J., did not sit.

Attorneys for Appellant:

JOHN DOUGLAS HUBBARD
WILLIAM EDWARD HARTLAGE
FULTON, HUBBARD & HUBBARD
117 East Stephen Foster Avenue
Bardstown, Kentucky 40004

Attorneys for Appellee:

DAVID L. ARMSTRONG
Attorney General

RICHARD S. BARLOW
Special Assistant Attorney General
Commonwealtn Attorney
Tenth Judicial District
P.O. Box 40
Bardstown, Kentucky 40004

JOHN GILLIG
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601-3439

NELSON CIRCUIT COURT

Indictment No. 85-CR-011-1

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

JOSEPH WILLIAM "BILLY" DOWNS - - *Defendant*

KRS 186A.325, Trafficking in Stolen Vehicles or Vehicle Parts, Class D Felony, and KRS 532.080, Persistent Felony Offender in the First Degree

---

FINAL JUDGMENT AND SENTENCE OF IMPRISONMENT—Entered March 10, 1986

The Defendant, having been adjudged guilty by a jury verdict of the crime of Trafficking in Stolen Vehicles or Vehicle Parts, Class D Felony, and of being a Persistent Felony Offender in the First Degree, on this the 5th day of March, 1986, the Defendant Joseph William Downs appeared in open Court with his attorney, Hon. John Douglas Hubbard, and the Court inquired of the Defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the Defendant and his counsel an opportunity to make statements in the Defendant's behalf and to present any information in mitigation of punishment, and the Court having given due consideration to the written report of the presentence investigation prepared by the Division of Probation and Parole, and the Court having informed the Defendant and his counsel of the factual contents and conclusions contained in said report and having afforded them

opportunity to controvert same, it is the judgment of the Court that probation or conditional discharge is prohibited under KRS 532.080 and that imprisonment is therefore required.

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the Defendant and it is therefore ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the crimes of Trafficking in Stolen Vehicle or Vehicle Parts, Class D Felony, and of being a Persistent Felony Offender in the First Degree, and that he shall be confined in the State Penitentiary for a maximum term of 10 years to run consecutively with the sentence imposed in Indictment Nos. 85-CR-012-1, 85-CR-013-1 and 85-CR-014-1; and

It is further ORDERED AND ADJUDGED that the Nelson County Sheriff shall deliver the Defendant to the custody of the Department of Corrections hereunder at such location within this State as the Department shall designate.

It is further ORDERED AND ADJUDGED that the Defendant is hereby credited with the time spent in custody prior to the commencement of sentence, namely 10 days toward the service of the maximum term of imprisonment.

Defendant was advised of his right of appeal to the Supreme Court of Kentucky, and that if he was unable to afford to retain counsel or pay for the preparation of the record, that counsel would be furnished him and the record prepared at public expense.

Dated this 5th day of March, 1986.

(s) Larry D. Raikes
Judge, Nelson Circuit Court

NELSON CIRCUIT COURT

Indictment No. 85-CR-012-1

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

JOSEPH WILLIAM "BILLY" DOWNS - - *Defendant*

KRS 514.110, Receiving Stolen Property 0/$100, Class D Felony and KRS 532.080, Persistent Felony Offender in the First Degree

---

FINAL JUDGMENT AND SENTENCE OF IMPRISONMENT—Entered March 10, 1986

The Defendant, having been adjudged guilty by a jury verdict of the crime of Knowingly Receiving Stolen Property, 0/$100, Class D Felony, and of being a Persistent Felony Offender in the First Degree, on this the 5th day of March, 1986, the Defendant Joseph William Downs appeared in open Court with his attorney, Hon. John Douglas Hubbard, and the Court inquired of the Defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the Defendant and his counsel an opportunity to make statements in the Defendant's behalf and to present any information in mitigation of punishment, and the Court having given due consideration to the written report of the presentence investigation prepared by the Division of Probation and Parole, and the Court having informed the Defendant and his counsel of the factual contents and conclusions contained in said report and having afforded them

opportunity to controvert same, it is the judgment of the Court that probation or conditional discharge is prohibited under KRS 532.080 and that imprisonment is therefore required.

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the Defendant and it is therefore ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the crime of Knowingly Receiving Stolen Property 0/$100, a Class D Felony, and of being a Persistent Offender in the First Degree, and that he shall be confined in the State Penitentiary for a maximum term of 10 years; and,

It is further ORDERED AND ADJUDGED that the Nelson County Sheriff shall deliver the Defendant to the custody of the Department of Corrections hereunder at such location within this State as the Department shall designate.

It is further ORDERED AND ADJUDGED that the Defendant is hereby credited with the time spent in custody prior to the commencement of sentence, namely 10 days toward the service of the maximum term of imprisonment.

Defendant was advised of his right of appeal to the Supreme Court of Kentucky, and that if he was unable to afford to retain counsel or pay for the preparation of the record, that counsel would be furnished him and the record prepared at public expense.

Dated this 5th day of March, 1986.

(s) Larry D. Raikes
Judge, Nelson Circuit Court

NELSON CIRCUIT COURT

Indictment No. 85-CR-013-1

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

JOSEPH WILLIAM "BILLY" DOWNS - - *Defendant*

KRS 514.110, Receiving Stolen Property 0/$100, Class D Felony and KRS 532.080, Persistent Felony Offender in the First Degree

---

FINAL JUDGMENT AND SENTENCE OF IMPRISONMENT—Entered March 10, 1986

The Defendant, having been adjudged guilty by a jury verdict of the crime of Knowingly Receiving Stolen Property, 0/$100, Class D Felony, and of being a Persistent Felony Offender in the First Degree, on this the 5th day of March, 1986, the Defendant Joseph William Downs appeared in open Court with his attorney, Hon. John Douglas Hubbard, and the Court inquired of the Defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the Defendant and his counsel an opportunity to make statements in the Defendant's behalf and to present any information in mitigation of punishment, and the Court having given due consideration to the written report of the pre-sentence investigation prepared by the Division of Probation and Parole, and the Court having informed the Defendant and his counsel of the factual contents and conclusions contained in said report and having afforded them opportunity

to controvert same, it is the judgment of the Court that probation or conditional discharge is prohibited under KRS 532.080 and that imprisonment is therefore required.

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the Defendant and it is therefore ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the crime of Knowingly Receiving Stolen Property 0/$100, Class D Felony, and of being a Persistent Felony Offender in the First Degree, and that he shall be confined in the State Penitentiary for a maximum term of 10 years to run concurrently with the sentence imposed in Indictment No. 85-CR-012-1 and

It is further ORDERED AND ADJUDGED that the Nelson County Sheriff shall deliver the Defendant to the custody of the Department of Corrections hereunder at such location within this State as the Department shall designate.

It is further ORDERED AND ADJUDGED that the Defendant is hereby credited with the time spent in custody prior to the commencement of sentence, namely 10 days toward the service of the maximum term of imprisonment.

Defendant was advised of his right of appeal to the Supreme Court of Kentucky, and that if he was unable to afford to retain counsel or pay for the preparation of the record, that counsel would be furnished him and the record prepared at public expense.

Dated this 5th day of March, 1986.

(s) Larry D. Raikes
Judge, Nelson Circuit Court

NELSON CIRCUIT COURT

Indictment No. 85-CR-014-1

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

JOSEPH WILLIAM "BILLY" DOWNS - - *Defendant*

KRS 514.110, Receiving Stolen Property 0/$100, Class D Felony, KRS 514.120, Obscuring Identity of Machine 0/$100, Class D Felony; and KRS 532.080, Persistent Felony Offender in the First Degree

---

FINAL JUDGMENT AND SENTENCE OF IMPRISONMENT

The Defendant, having been adjudged guilty by a jury verdict of the crime of Knowingly Receiving Stolen Property, 0/$100, Class D Felony, Obscuring Identity of Marchine 0/$100, Class D Felony; and of being a Persistent Felony Offender in the First Degree, on this the 5th day of March, 1986, the Defendant Joseph William Downs appeared in open Court with his attorney, Hon. John Douglas Hubbard, and the Court inquired of the Defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the Defendant and his counsel an opportunity to make statements in the Defendant's behalf and to present any information in mitigation of punishment, and the Court having given due consideration to the written report of the pre-sentence investigation prepared by the Division of Probation and Parole, and the Court having informed the Defendant and his counsel of the factual contents and conclusions con-

tained in said report and having afforded them opportunity to controvert same, it is the judgment of the Court that probation or conditional discharge is prohibited under KRS 532.080 and that imprisonment is therefore required.

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the Defendant and it is therefore ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the crime of Knowingly Receiving Stolen Property, 0/$100, Class D Felony, Obscuring the Identity of Marchine 0/$100, Class D Felony and of being a Persistent Felony Offender in the First Degree, and that he shall be confined in the State Penitentiary for a maximum term of 10 years under Count I and to run concurrently with Indictment No. 85-CR-012 and 10 years on Count II to run concurrently with the sentence imposed under Count I of this Indictment and concurrently with the sentence imposed in 85-CR-013, and

It is further ORDERED AND ADJUDGED that the Nelson County Sheriff shall deliver the Defendant to the custody of the Department of Corrections hereunder at such location within this State as the Department shall designate.

It is further ORDERED AND ADJUDGED that the Defendant is hereby credited with the time spent in custody prior to the commencement of sentence, namely 10 days toward the service of the maximum term of imprisonment.

Defendant was advised of his right of appeal to the Supreme Court of Kentucky, and that if he was unable to afford to retain counsel or pay for the preparation of the record, that counsel would be furnished him and the record prepared at public expense.

Dated this 5th day of March, 1986.

(s) Larry D. Raikes
Judge, Nelson Circuit Court

Supreme Court, U.S.
FILED
JAN 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-741

SUPREME COURT OF THE UNITED STATES

October Term 1987

JOSEPH WILLIAM "BILLY" DOWNS - Petitioner

versus

COMMONWEALTH OF KENTUCKY - - Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

FREDERIC J. COWAN
Attorney General

RICKIE L. PEARSON
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
(502) 564-7600

Counsel for Respondent

29pp

QUESTIONS PRESENTED FOR REVIEW

I. Did the trial court properly allow the Commonwealth to introduce the out-of-court statements of Freddy and Danny Thompson after they refused to testify, where such refusal was procured by the petitioner?

II. Did the trial court's application of KRS 29A.040, providing that a list of registered voters shall be used or included in the jury pool, constitute a denial of petitioner's right to a jury drawn from a source fairly representative of the community?

TABLE OF CONTENTS

	Page No.
QUESTIONS PRESENTED.....	i
OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
COUNTERSTATEMENT OF THE CASE....	2-3
COUNTERSTATEMENT OF THE FACTS...	4-13
ARGUMENTS.....	13-22
I. THE TRIAL COURT PROPERLY ALLOWED THE COMMONWEALTH TO INTRODUCE THE OUT-OF-COURT STATEMENTS OF FREDDY AND DANNY THOMPSON, AFTER THEY REFUSED TO TESTIFY, SINCE THEIR REFUSAL WAS PROCURED BY THE PETITIONER.....	13-19

Page No.

II. THE TRIAL COURT'S APPLICATION OF KRS 29A.040, PROVIDING THAT A LIST OF REGISTERED VOTERS SHALL BE USED OR INCLUDED IN THE JURY POOL, DID NOT CONSTITUTE A DENIAL OF PETITIONER'S RIGHT TO A JURY DRAWN FROM A SOURCE FAIRLY REPRESENTATIVE OF THE COMMUNITY..... 20-22

CONCLUSION..... 23

CERTIFICATE OF SERVICE..... 24

TABLE OF AUTHORITIES

Page No.

Cases:

Motes v. United States,
178 U.S. 458 at 472,(1900) .. 13

Douglas v. Alabama,
380 U.S. 415,
85 S.Ct. 1074, (1965) 14, 15, 16

United States v. Mayes,
512 F.2d 637 (6th Cir. 1975).. 16

Ohio v. Roberts,
448 U.S. 56, 66 (1980) 17

Taylor v. Louisiana,
419 U.S. 522, 538, (1975) 21

Duren v. Missouri,
439 U.S. 357, 364, (1979) 21

Other Authorities:

Kentucky Revised
Statute 29A.040 20

Rule of the Supreme Court
of the United States 21.1(h).. 19

28 U.S.C. §1257(3) 19

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

No. 87-741

JOSEPH WILLIAM "BILLY" DOWNS - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the Supreme Court of Kentucky is correctly set forth in slip form in the petitioner's Appendix to his Petition.

JURISDICTION

The jurisdictional facts presented by the petitioner are correct. However, respondent affirmatively states this Court lacks jurisdiction to consider petitioner's argument that a waiver of dual representation should have been secured since this claim was never presented by petitioner to the Supreme Court of Kentucky. 28 U.S.C. §1257(3); Rule of the Supreme Court of the United States 21.1(h).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner correctly states the constitutional provisions involved.

COUNTERSTATEMENT OF THE CASE

The petitioner, Joseph William "Billy" Downs, was found guilty following a trial by jury in the Nelson Circuit Court of three counts of Knowingly

Receiving Stolen Property, one count of Obscuring the Identity of a Machine and one count of Trafficking in Stolen Vehicle Parts. Petitioner was however, acquitted on one count of Obscuring the Identity of a Machine. Following the jury's verdict on the primary charges the jury then found petitioner guilty of being a First Degree Persistent Felony Offender and recommended enhanced sentences of ten years on each of the five counts. The trial court, upon the jury's recommendations, thereafter finally sentenced the petitioner to a total of twenty years imprisonment.

The Supreme Court of Kentucky affirmed petitioner's conviction on June 11, 1987.

COUNTERSTATEMENT OF THE FACTS

Acting on an anonymous tip, police conducted a search of the Danny Thompson farm in Nelson County, Kentucky in February, 1985 (T.E. 242). In a metal building on the farm, police officers found a stolen 1979 maroon Ford pickup truck that was in the process of being stripped and its identity obscured (T.E. 250-251). A new Massey-Ferguson four wheel drive tractor that had been stolen from the Langley Implement Company of Elizabethtown, Kentucky was found in a wooded area behind Thompson's barn (T.E. 252-253). About fifteen vehicle frames and ten to twelve vehicle doors which had their identification numbers removed were also found. Altogether, the physical evidence indicated that approximately twenty-five vehicles had been

disassembled on the Thompson farm (T.E. 296-297).

Danny Thompson was having financial difficulties when petitioner approached him wanting to store a grain truck on his farm for $100.00 a week. Three or four weeks later a John Deere tractor was brought onto the farm. Thompson was suspicious by this time, but petitioner promised to give Thompson $100.00 for every vehicle brought onto the farm. After a few other vehicles had arrived, petitioner asked Danny Thompson and his brother, Freddy, to begin helping him strip the vehicles (T.E. 157-160). Freddy Thompson told petitioner he was afraid they would be caught; petitioner vowed to "slack up." After about three weeks, petitioner brought in more

vehicles, and not long after that the police arrived (T.E. 223-224).

At trial, petitioner employed a two-prong defense: (1) Keep potential Commonwealth witnesses off the stand by encouraging or inducing them to plead the Fifth Amendment; and (2) Discredit any witnesses who testify for the Commonwealth by arguing that a "deal" was made to give testimony in return for favorable treatment by the Commonwealth.

Petitioner went to the Thompson brothers and asked them to see his trial counsel, the Honorable John Douglas Hubbard. He apparently suggested that they should have Mr. Hubbard represent them. (Transcript of March 5, 1986, p.xlxx). The Thompsons employed petitioner's trial counsel to represent them on the charges they faced in this

matter. Petitioner's counsel agreed to defend them conditioned upon their "promise," "representation," and "assurance" that they "would not testify against Billy at trial" (T.E. 125-126; Transcript of March 5, 1986, pp. xxxvi, xl, xliii).

Danny and Freddy Thompson testified extensively before the April 17, 1985 Grand Jury. Consequently, they were indicted by the Grand Jury and entered pleas of guilty to those charges. Thereafter, they were subpoenaed to testify at trial. When Danny Thompson was called by the Commonwealth, petitioner's counsel approached the bench and stated: "Your Honor, I represent both Danny and Freddy Thompson . . . and I now want to make it known to the Court that

they will take the Fifth Amendment" (T.E. 118). When the Commonwealth attempted to have Danny Thompson sworn, counsel responded: "He doesn't have to be sworn. I'm his attorney and I say he's taking the Fifth" (T.E. 119). Freddy Thompson intended to testify until advised by petitioner's counsel not to testify (Transcript of March 5, 1986, p. xlii).

Following an in-chambers conference, the trial court ruled that the Thompsons had no right to invoke the Fifth Amendment because they had already pled guilty and had been finally sentenced on charges arising out of this case. Additionally, the Thompsons had already voluntarily testified at length before the Grand Jury with respect to the charges for which petitioner was

subsequently indicted. The trial court therefore ruled that the Thompsons could be called to the stand and that the Commonwealth could ask them the same questions they had been asked in the Grand Jury proceedings and in police interviews. Such questioning would lay a foundation for introducing those statements in the event they continued to answer questions despite the Court's order that they do so. When the Thompsons persisted in their refusal to testify, the Court sentenced them to jail outside the presence of the jury (T.E. 133-135, 149-152).

The next witness to be stifled was Alex Montgomery of Campbellsville, Kentucky. Petitioner had taken the stolen John Deere tractor to Mr. Montgomery's car dealership and traded it

in on a used Buick Riviera. The police, acting on information received from the Thompsons, John Metcalf, and Charles Blanford, went to Campbellsville and recovered the tractor from Montgomery.

Montgomery had given police an eight page statement detailing the transaction with petitioner. Moreover, on the day he was to testify at trial, his attorney, the Honorable Phillip George, advised the trial court that Mr. Montgomery would invoke the Fifth Amendment if called to the stand. It appeared that Mr. Montgomery had received multiple telephone calls from petitioner the preceding weekend urging him to talk to petitioner's counsel. Finally, Mr. Montgomery did call petitioner's counsel and as a result of that conversation he became afraid his testimony could lead to

him being charged with mail fraud. (T.E. 183-188).

Having been frustrated in its efforts to prove the details of petitioner's disposition of the John Deere tractor through Mr. Montgomery, the Commonwealth subpoenaed Mr. Curtis Bush. Mr.Bush was an employee of Mr. Montgomery whom petitioner initially approached with the offer to trade the tractor in for the Riveria. Mr. Bush had deferred that decision to Mr. Montgomery since accepting tractors as trade-ins was outside his authority. Bush had likewise given a statement to police. When he appeared in response to the subpoena, he, too, claimed the Fifth Amendment.

Although Mr. Bush was independently represented, petitioner's counsel joined in the argument that he should not be

compelled to testify. The Commonwealth's position was that Mr. Bush had no role in the trade beyond referring the matter to his superior, but Mr. Bush eventually signed an affidavit which the trial court ordered sealed and which satisfied the court that a valid Fifth Amendment issue had been raised. (T.E. 377-384, 435).

Petitioner's second line of defense was to attack the credibility of any witness who had contact with him by alleging that "deals" had been made by the Commonwealth to obtain testimony against petitioner. That line of attack was pursued in petitioner's cross-examination of Mr. Blanford and Mr. Metcalf, the only two of the original six witnesses having had dealings with petitioner who were not induced to take the Fifth Amendment. (T.E. 336, 359).

Additional facts shall be developed, as necessary, in the argument section of this brief.

ARGUMENT

I.

THE TRIAL COURT PROPERLY ALLOWED THE COMMONWEALTH TO INTRODUCE THE OUT-OF-COURT STATEMENTS OF FREDDY AND DANNY THOMPSON, AFTER THEY REFUSED TO TESTIFY, SINCE THEIR REFUSAL WAS PROCURED BY THE PETITIONER.

The law has long recognized that a party will not be heard to complain about a problem which he has voluntarily created. Thus, in Motes v. United States, 178 U.S. 458 at 472, (1900), Justice Harlan, quoting from Reynolds v. United States, said:

> "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if

> he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated."

The principle recognized some ninety years ago in Motes is just as applicable today in this case.

Douglas v. Alabama, 380 U.S. 415, (1965) presents bright-line principles of law which interpret the confrontation clause. The petitioner's inability in that case to cross-examine an accomplice about a confession, which was read to the jury by the prosecutor, constituted a deprivation of the right of confrontation found in the Sixth Amendment made applicable to the states by the Fourteenth Amendment. In contrast to the case at bar, there was no indication that

the Petitioner in Douglas had in any manner procured the slience about which he complained. Douglas, supra at 420. In this case, however, the record fully reflects that the Thompsons' refusal to answer was procured by the petitioner himself, acting through his attorney.

Petitioner suggested that the Thompsons consult with his attorney regarding the charges against them. Petitioner's counsel agreed to represent the Thompsons only upon their "promise," "representation," and "assurance" that they would not testify against petitioner at trial. The record clearly reflects that the constitutional privilege was not asserted by Danny and Freddy Thompson personally, but by the attorney for petitioner, who announced to the court

that he conveniently represented the Thompsons as well.

The Thompsons' refusal to testify was obviously procured by the petitioner, acting through his attorney. The unfairness which amounts to a denial of the right of confrontation is the inability of an accused to face his accuser and challenge the accusation. Douglas v. Alabama, supra, at 419. However, no unfairness occurs in a case such as this where the denial is brought about by the accused himself in furtherance of his own interests at trial. United States v. Mayes, 512 F.2d 637 (6th Cir. 1975), cert. denied 442 U.S. 1008 (1975). (Defendant's attorney also "represented" a witness who asserted Fifth Amendment privilege.)

The hearsay statements of the Thompsons were properly admitted by the trial court since the Grand Jury testimony and statements to police possessed more than "adequate indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 66 (1980). The Thompsons had been questioned by the police on two separate dates. They were subsequently questioned at length, under oath, and before the Grand Jury. They were obviously aware when testifying before the Grand Jury, that what they said would be closely scrutinized. Their version of several events was corroborated through information obtained from other witnesses, i.e., John Metcalf, Charles Blanford, Alex Montgomery, Curtis Bush and Don Ingram. Further, the vehicles they described which petitioner had

disposed of were, in fact, found where they said they could be. There were more than adequate indicia of reliability to justify admission of the Thompsons' heresay statements once Petitioner procured the Thompsons' silence.

The conduct of petitioner's defense counsel, in asserting the privilege, the result of which petitioner now complains, was obviously aimed at protecting the accused and stifling what would have been obviously damaging testimony. Having endeavored, through his attorney, to keep the Thompsons silent at trial, petitioner should not be heard now to complain that he was denied his confrontation rights since he was the moving force behind the Thompsons' silence at trial.

In addition to the confrontation issue, petitioner also raises the issue

that his conviction should be set aside because there was no waiver of dual representation executed in the trial court (Petitioner's Brief at pp. 11-12). The Opinion of the Supreme Court of Kentucky does not address this particular issue since petitioner failed to raise it in his state court appeal. (Petitioner's Appendix at pp. 1a-6a). This Court therefore lacks jurisdiction to consider the waiver of dual representation argument since it was never presented by him to the Supreme Court of Kentucky. 28 U.S.C. §1257(3); Rule of the Supreme Court of the United States 21.1(h).

The state courts properly allowed the Thompsons' out-of-court statements to be used since petitioner himself was the cause of the Thompsons' silence. The writ should be denied.

II.

THE TRIAL COURT'S APPLICATION OF KRS 29A.040, PROVIDING THAT A LIST OF REGISTERED VOTERS SHALL BE USED OR INCLUDED IN THE JURY POOL, DID NOT CONSTITUTE A DENIAL OF PETITIONER'S RIGHT TO A JURY DRAWN FROM A SOURCE FAIRLY REPRESENTATIVE OF THE COMMUNITY.

Kentucky Revised Statute 29A.040 provides that all voter registration lists shall constitute a master list of prospective jurors. Petitioner argues that the statute denied his federal constitutional right to a jury drawn from a source fairly representative of the community. His argument is without merit.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant a trial "by an impartial jury of the state and district wherein the crime shall have been committed." The amendment has been interpreted to

guarantee a criminal defendant a jury "drawn from a source fairly representative of the community." Taylor v. Louisiana, 419 U.S. 522 (1975).

To establish a prima facie violation of the "fair cross-section" requirement, the petitioner must show (1) that the group alleged to be excluded is a "cognizable" or "distinctive" group within the community; (2) that the representation of this group is not fair and reasonable in relation to the number of such persons in the community; and (3) that the underrepresentation is inherent in the system used to select the jury pools or venires. Duren v. Missouri, 439 U.S. 357, 364 (1979).

Petitioner apparently contends that voter registration lists are per se a constitutionally inadequate source of

jurors since those not registered to vote would not be summoned for jury service. Petitioner has utterly failed to make a prima facie showing or otherwise demonstrate that the Commonwealth's use of voter registration lists has resulted in the systematic exclusion of a cognizable group from the jury pool. In the absence of a prima facie showing by petitioner that the use of the voter registration lists resulted in the systematic exclusion of a cognizable group or class of qualified citizens the use of such lists by the Commonwealth is constitutionally permissible.

The petition should be denied.

CONCLUSION

For the foregoing reasons the respondent submits that the Petition for a Writ of Certiorari to the Supreme Court of Kentucky should be denied. Review by this Honorable Court is clearly not warranted.

Respectfully submitted,

FREDERIC J. COWAN
ATTORNEY GENERAL

Rickie L. Pearson

RICKIE L. PEARSON
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601
(502) 564-7600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Rickie L. Pearson, counsel for the respondent, hereby certify that three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari was served by mailing true copies thereof to Hon. William Edward Hartlage, Fulton Hubbard & Hubbard, 117 East Stephen Foster Avenue, Bardstown, Kentucky 40004-0088, counsel for petitioner, this 15th day of January, 1988.

Rickie L. Pearson